THE LIABILITY OF TELEGRAPH COMPANIES FOR NEGLIGENCE IN THE TRANSMISSION AND DELIVERY OF MESSAGES.

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[*Continued from October Number.*]

V. THE MEASURE OF DAMAGES FOR THE NEGLIGENT BREACH OF DUTY.

(1). *General Rules and Illustrations.*

In his action against the telegraph company the plaintiff can recover only the actual and proximate damages suffered by him from the company's negligent breach of duty. The word, actual, excludes all unlawful, contingent, or expectant damages. Thus, the plaintiff cannot recover the profits he would have made, or the losses he would have escaped, in a gambling transaction, as dealing in futures, had the message been accurately and promptly transmitted and delivered.[1] So, where, because of error in a telegram, the plaintiff's race horse was sent to the wrong place, and so prevented from participating in a race, the plaintiff cannot recover for prizes that his horse might have won, since such damages, being merely contingent, are not recognized in the law.[2] Under the head of damages contingent, and hence not recoverable, come the profits that the plaintiff might have made on goods that would have been shipped him, had his message ordering the goods been properly transmitted.[3] But where the telegram is an order to fulfill contracts already made, and the telegraph company is sufficiently apprised of the circumstances, the profits that would have been made are recoverable.[4] So where an offer of work, or of a position, is telegraphed to

[1]Cothran v. Teleg. Co., 83 Ga. 25, 9 S. E. 836; Melchert v. Teleg. Co., 11 Fed. 194; Cahn v. Teleg. Co., 46 Fed. 40; Smith v. Teleg. Co., 83 Ky. 104, 4 Am. St. Rep. 126.

[2]Western U. Teleg. Co. v. Crall, 39 Kans. 580, 4 Am. St. Rep. 495.

[3]Western U. Teleg. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136; Hubbard v. Teleg. Co., 33 Wis. 558, 14 Am. Rep. 775; Johnson v. Teleg. Co., 79 Miss. 58, 89 Am. St. Rep. 584; Ross v. Teleg. Co., 81 Fed. 676. See Western U. Teleg. Co. v. Hall, 124 U. S. 444; First Nat. Bank v. Teleg. Co., 30 Ohio St. 555, 27 Am. Rep. 485; Alexander v. Teleg. Co., 66 Miss. 161, 14 Am. St. Rep. 556; Squire v. Teleg. Co., 98 Mass. 232, 93 Am. Dec. 93.

[4]Ferro v. Teleg. Co., 9 App. Dec. 455, 35 L. R. A. 548.

the plaintiff, and there is nothing to show that he would have accepted the offer,[5] or the offer mentions no definite time of employment,[6] the wages, or salary, that would have been earned are too uncertain and contingent. Recovery would be allowed, where the plaintiff is dependent upon the sender of the message for an opportunity to work, or is awaiting an offer of employment.[7] For other examples of contingent damages see cases in footnote.[8]

The damages must be proximate, not too remote, that is, they must arise naturally, and according to the ordinary course of events out of the breach of duty. Thus, where the plaintiff telegraphed for a railway ticket and, because of the non-delivery of the message, was compelled to walk home, and on the way was run over by a railway train and injured, he could not recover from the telegraph company for the injury.[9] So, where, because of the delay of a telegram, the plaintiff was unable to take a barge up a river for a load of staves, and the staves were swept away by a flood, the telegraph company could not be held responsible for the loss.[10] Illustrations under this head are numerous.[11]

But not all the damages which arise naturally from the breach of contract may be recovered. In determining the measure of damages in actions against telegraph companies for negligence in regard to the messages, the courts have almost universally treated the actions as actions *ex contractu,* applying the rule of *Hadley* v. *Baxendale.*[12] So the measure of damage is more narrowly confined than in tort actions, where all the natural and proximate consequences of the breach may be recovered. To quote from the opinion of Baron Alderson in *Hadley* v. *Baxendale*:

"Where two parties have made a contract which one of them has broken, the damage, which the other party ought to receive in respect of such con-

[5]Johnson v. Teleg. Co., 79 Miss. 58, 29 Sou. 787; Western U. Teleg. Co. v. Clifton, 68 Miss. 307, 8 Sou. 746; Clay v. Teleg. Co., 81 Ga. 285, 6 S. E. 813.

[6]Merrill v. Teleg. Co., 78 Me. 97, 2 Atl. 847.

[7]Western U. Teleg. Co. v. Hines, 96 Ga. 688, 51 Am. St. Rep. 159; Clay v. Teleg. Co., 81 Ga. 285, 6 S. E. 813.

[8]Western U. Teleg. Co. v. Kendzora, 77 Tex. 257, 13 S. W. 986; Duncan v. Teleg. Co., 87 Wis. 173, 58 N. W. 75; Chapman v. Teleg. Co., 90 Ky. 265, 13 S. W. 880; Kenyon v. Teleg. Co., 100 Cal. 454, 35 Pac. 75; Walser v. Teleg. Co., 114 N. C. 440, 19 S. E. 366.

[9]Barnes v. Teleg. Co., 24 Nev. 125, 77 Am. St. Rep. 791.

[10]Bodkin v. Teleg. Co., 31 Fed. 134.

[11]See Lowery v. Teleg. Co., 60 N. Y. 198; Landsberger v. Teleg. Co., 32 Barb. 530; Ross v. Teleg. Co., 81 Fed. 676; Western U. Teleg. Co. v. Smith, 76 Tex. 253, 13 S. W. 169; McAllen v. Teleg. Co., 70 Tex. 243, 7 S. W. 715; Western U. Teleg. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598.

[12]9 Exch. 341, 5 Eng. Rul. Cas. 502.

tract, should be such as may fairly and reasonably be considered, either as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

This rule, which has been rarely controverted, is construed by the judges and authors, as recognizing and establishing two separate grounds for recovery: *first,* damages may be recovered for the natural consequences of the breach, that is, such consequences as ordinarily result from the breach of similar contracts, which may be called, direct damages; *secondly,* damages may be recovered for losses arising out of the special circumstances of the particular contract, such as are not common to all similar contracts, which may be called, consequental damages. For recovery to be allowed under the second part of the rule, the special circumstances must have been, at the time of the making of the contract brought to the notice of both parties.[13] In the case of a telegraph message, the loss that directly results from the negligence of the company is the price paid for transmission. The consequential losses that may result are various and, of course, much more extended; a profitable sale may be prevented, or great physical or mental suffering may be caused. But recovery can be had for these consequential losses only when the company is apprised of the special circumstances out of which they arise. Such knowledge may be acquired by the company either from the message itself,[14] or from information otherwise obtained.[15] A knowledge of all the circumstances or of the exact, or probable amount of the loss that may ensue from the breach, is not necessary. By the great weight of authority, the company is sufficiently charged with knowledge to make it liable for the consequential damages that result from its negligence,

"if the face of the message clearly shows that a business transaction is contemplated, and that negligence in its transmission [or delivery] may reasonably be attended with pecuniary loss."[16]

[13]1 Sedgw. Dam., Sec. 115, note (a); Hale on Damages, p. 54 et seq.; Griffin v. Clover, 16 N. Y. 489.

[14]See cases foot-note (17), infra.

[15]Herron v. Teleg. Co., 90 Iowa 129, 57 N. W. 696; Western U. Teleg. Co. v. Way, 83 Ala. 542, 4 Sou. 844; Thompson v. Teleg. Co., 64 Wis. 531, 25 N. W. 789; Candee v. Teleg. Co., 34 Wis. 471, 17 Am. Rep. 452; Bright v. Teleg. Co., (N. C.) 43 S. E. 843; Western U. Teleg. Co. v. Cavin, (Tex.) 70 S. W. 229.

[16]Shepherd J., in Fererro v. Teleg. Co., 9 App. D. C. 455, 35 L. R. A. 548.

Thus, where the plaintiff's message to his agent read, "Buy fifty Northwestern, fifty Prairie du Chein, limit forty-five," it was held sufficient to put the company on notice that a purchase of stock was involved, and to make it responsible for the plaintiff's loss, when the agent bought at a higher price than he would have paid if the message had been promptly transmitted.[17]

The damages that may result to the plaintiff may be grouped roughly under two heads:

First, a message erroneously transmitted may cause the plaintiff, or his agent, to act so as to suffer loss. For example, the plaintiff's correspondent, replying to his query as to the price of melons, telegraphs a certain price, which is changed to a higher price in the course of transmission. The plaintiff, on the strength of the message, ships a quantity of melons, which are sold at a loss. The plaintiff may recover the difference between the market price at his place of business and that at the place to which the melons are shipped, together with the cost of transportation.[19] So, where the plaintiff, through an erroneous telegram, is caused to take an unnecessary trip, he may recover the expenses of his trip and the value of his lost time.[20] For further illustrations, see cases cited in footnote.[21]

In this group come those cases in which the price, in a telegraphic offer to sell goods, is changed to a lower one, and the addressee accepts the offer at the lower price. The Georgia court has held that the sender is bound by the offer as delivered to the addressee, on the ground that the telegraph company is the agent of the sender to make the offer, and that the sender may recover

[17]United States Teleg. Co. v. Wenger, 55 Pa. St. 262. See also: Tyler v Teleg. Co., 60 Ill. 421, 14 Am. Rep. 38; Maneville v. Teleg. Co., 37 Iowa 214, 18 Am. Rep. 8; Western U. Teleg. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; Squire v. Teleg. Co., 98 Mass. 232, 93 Am. Dec. 157; Western U. Teleg. Co. v. Hall, 124 U. S. 444; Postal Teleg. Co. v. Lathrop, 131 Ill. 575, 7 L. R. A. 474; Pepper v. Teleg. Co., 87 Tenn. 554, 10 Am. St. Rep. 699; True v. Teleg. Co., 69 Me. 9, 11 Am. Rep. 156; Western U. Teleg. Co. v. Lowery, 32 Neb. 732, 49 N. W. 707; Western U. Teleg. Co. v. Sheffield, 71 Tex. 570, 10 Am. St. Rep. 790; Western U. Teleg. Co. v. Adams, 75 Tex. 531, 16 Am. St. Rep. 920. But see Garrett v. Teleg. Co., 83 Iowa 257, 49 N. W. 88.

[19]Hollis v. Teleg. Co., 91 Ga. 801, 18 S. E. 287.

[20]Western U. Teleg. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; Tobin v. Teleg. Co., 146 Pa. St. 375, 28 Am. St. Rep. 802.

[21]Turner v. Teleg. Co., 41 Iowa 458, 30 Am. Rep. 605; Western U. Teleg. Co. v. Hobson, 15 Gratt. 122; Western U. Teleg. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; De Rutte v. Teleg. Co., 1 Daly 547, Allen's Cases 273; Tyler v. Teleg. Co., 60 Ill. 421, 14 Am. St. Rep. 38; Western U. Teleg. Co. v. Crawford, 110 Ala. 460, 20 Sou. 111; Western U. Teleg. Co. v. Dubois, 128 Ill. 248, 15 Am. St. Rep. 109; Postal Teleg. Co. v. Lathrop, 131 Ill. 575, 23 N. E. 584, 7 L. R. A. 474; Western U. Teleg. Co. v. Edsall, 74 Tex. 329, 15 Am. St. Rep. 835.

damages from the telegraph company for thus being forced to sell his goods below the market price.[22] But the better view, and that of the weight of authority, is that the telegraph company is not the agent of the sender, but merely the means of transmission, and that, since the sender is not bound by the erroneous offer, the damages that he suffers are the direct result of his own fault in abiding by the offer, and not of the negligence of the telegraph company.[23]

Secondly, negligent failure or delay in forwarding or delivery may cause the plaintiff to suffer a loss that would have been prevented, or may prevent him from making a profit that he would have made. Thus, the plaintiff's telegram to his agent to attach the property of his debtor is negligently delayed, and other creditors seize the property. He may recover the amount of his debt.[24] Again, the plaintiff telegraphs his agent to buy certain stock, and, while the message is delayed, the price rises, and the agent buys at the increased price. He may recover the difference between the market price at the time the message should have been delivered and that at the time the stock was bought.[25] So a telegram accepting a position offered for a month is not delivered, and the offer expires by lapse of time. The plaintiff may recover the nonth's salary.[26]

See other cases cited in foot-note.[27]

(2). *Cipher Messages.*

The doctrine of the great majority of the courts, as to the measure of damages in case of unintelligible or cipher messages,

[22]Western U. Teleg. Co. v. Flint River Lumber Co., 114 Ga. 576, 88 Am. St. Rep. 36; Western U. Teleg. Co. v. Shotter, 71 Ga. 760. See also, but on different ground, Ayer v. Teleg. Co., 79 Me. 493, 10 Atl. 495.

[23]Pepper v. Teleg. Co., 87 Tenn. 554, 10 Am. St. Rep. 699; Shingleur v. Teleg. Co., 72 Miss. 1030, 30 L. R. A. 444; Postal Teleg. Co. v. Shaefer, (Ky.) 62 S. W. 1119.

[24]Bryant v. Teleg. Co., 1 Daly 575, Allen's Cases 289; Parks v. Teleg. Co., 13 Cal. 422, Allen's Cases 114.

[25]Pearsall v. Teleg. Co., 124 N. Y. 256, 21 Am. St. Rep. 662.

[26]Baldwin v. Teleg. Co., 93 Ga. 692, 44 Am. St. Rep. 194.

[27]United States Teleg. Co. v. Wenger, 55 Pa. St. 262; Daugherty v. Teleg. Co., 75 Ala. 168, 51 Am. Rep. 435; Western U. Teleg. Co. v. James, 90 Ga. 254, 16 S. E. 83; Hadley v. Teleg. Co., 115 Ind. 191, 15 N. E. 845; Western U. Teleg. Co. v. Woods, 56 Kans. 737, 44 Pac. 989; Western U. Teleg. Co. v. Pack. & Prov. Co., (Ill.) 58 N. E. 958; Garrett v. Teleg. Co., (Iowa) 58 N. W. 1064; Brooks v. Teleg. Co., (Utah) 72 Pac. 499; Western U. Teleg. Co. v. Longwill, (N. M.) 21 Pac. 339; Herron v. Teleg. Co., (Iowa) 57 N. W. 696; Western U. Teleg. Co. v. Hyer, 22 Fla. 637, 1 Am. St. Rep. 222; Western U. Teleg. Co. v. Fatman, 73 Ga. 285, 54 Am. Rep. 877; Bodkin v. Teleg. Co., 31 Fed. 134; Western U. Teleg. Co. v. Proctor, 82 Tex. 323, 18 S. W. 221; Western U. Teleg. Co. v. Brown, 84 Tex. 54, 19 S. W. 336; True v. Teleg. Co., 69 Me. 9, 9 Am. Rep. 156; Squire v. Teleg. Co., 98 Mass. 232, 93 Am. Dec. 157.

naturally and directly follows from the general principles above set forth. Since, in the absence of extrinsic information, the company knows nothing about the special circumstances out of which loss may arise, only the direct loss, the price paid for transmission may be recovered.[28]

There are, it seems, but five States in which the law is that consequential damages may be recovered for negligence in regard to an unintelligible or cipher message, even in the absence of extrinsic information as to the meaning of the message. These States are Alabama, Virginia, Kentucky, Mississippi and Georgia. Many cases are cited in favor of this doctrine, which, upon examination, are found to be authority only for the other doctrine, already discussed, that, where the language of the message is sufficient to put the company on notice that a business transaction is involved, the company will be liable for consequental damages. The two classes of cases must be distinguished. A cipher message, properly speaking, is one which leaves the company altogether ignorant as to its meaning. The Kentucky case[29] is not well considered. The decision in the Virginia case, while the direct question is considered and argued with some force, is by a divided court, and is based largely upon the Virginia statutes. In Georgia it is expressly provided by statute that the liability for cipher messages shall be the same as for intelligible messages.[30]

The Alabama cases are carefully considered and forcibly argued. *Daugherty* v. *Teleg. Co.*[31] attacks the rule of *Hadley* v. *Baxendale,* and contends that there should be no difference between the measure of damages for breach of contract and that for tort; but the rule of *Hadley* v. *Baxendale* is now too firmly established in the

[28]Primrose v. Teleg. Co., 154 U. S. 1; Sanders v. Stuart, 1 C. P. D. 326, 17 Moak's Rep. 286; United States Teleg. Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519; Candee v. Teleg. Co., 34 Wis. 471, 17 Am. Rep. 452; Hart v. Direct Cable Co., 86 N. Y. 633; Ferguson v. Teleg. Co., 178 Pa. St. 377, 56 Am. St. Rep. 770; Daniel v. Teleg. Co., 61 Tex. 452, 48 Am. Rep. 305; Cannon v. Teleg. Co., 100 N. C. 300, 6 Am. St. Rep. 590; Western U. Teleg. Co. v. Wilson, 32 Fla. 527, 37 Am. St. Rep. 125 (overruling Western U. Teleg. Co. v. Hyer, infra); Hill v. Teleg. Co., 43 S. C. 367, 46 Am. St. Rep. 734; Western U. Teleg. Co. v. Hall, 124 U. S. 444; Western U. Teleg. Co. v. Coggin, 68 Fed. 136. And see cases cited in Western U. Teleg. Co. v. Wilson, supra. But see, Daugherty v. Teleg. Co., 75 Ala. 165, 51 Am. Rep. 435; Western U. Teleg. Co. v. Way, 83 Ala. 542, 4 Sou. 844; Western U. Teleg. Co. v. Reynolds, 77 Va. 173, 46 Am. Rep. 715; Western U. Teleg. Co. v. Eubank, 100 Ky. 591, 66 Am. St. Rep. 361: Shaw v. Teleg. Co., 79 Miss. 670, 89 Am. St. Rep. 666; Western U. Teleg. Co. v. Hyer Bros., 22 Fla. 637, 1 Am. St. Rep. 222 (overruled by Western U. Teleg. Co. v. Wilson, supra).

[29]Western U. Teleg. Co. v. Eubank, 100 Ky. 591, 66 Am. St. Rep.

[30]2 Stimson's Am. St. Law, Sec. 8950.

[31]75 Ala. 168, 51 Am. Rep. 435.

law to be questioned. Again, in the same case, it is argued that, even under the rule, more than mere nominal damages may be recovered, because the direct loss resulting from the breach is the loss of the information which was to be conveyed, and that the value of that information to the plaintiff is measured by the gain that would have been brought, or the loss that would have been prevented, by its proper transmission. The argument is worthy of consideration, but it seems that the direct loss, the loss that ordinarily results from the breach of a contract to transmit a message, is the amount charged by the company for its services.

Another argument used is that it is unnecessary for the servants of the company to know the meaning of messages, since their whole duty is to transmit and deliver promptly the very words given them. The argument is completely answered by Somerville, J., in his dissenting opinion in *Western U. Teleg. Co.* v. *Way*.[32] He says:

"When the sender elects to studiously conceal from the operator the contents or nature of the message, he thereby puts the telegraph company in the darkness of ignorance as to the character of the duty imposed upon it, or the magnitude of its liability. The company cannot know, therefore, whether the breach of the obligation will probably be followed by a hundred or a hundred thousand dollars damages. This is both unreasonable and unjust, for telegraph companies are not common carriers; but their liability, like that of ordinary bailees, is based upon the degree of care or negligence exercised by them in the discharge of their duties. The care and diligence must then, upon every well-settled principle of our jurisprudence, be in proportion to the duty in hand, varying according to the magnitude of the subject-matter of the bailment. Nothing is more important or just, in this view of the subject, than that the law should require the sender at his hazard to disclose the meaning or nature of the message, in order that the company may observe such precautions as may be necessary to guard itself against the risk incident to the duty to be performed."

Then, the question has been asked: Since the negligence of the company is a tort, why not apply the rule applicable to torts, and so hold the company liable for all the natural and proximate results of its breach of duty, whether the special circumstances were in the contemplation of the parties or not? The considerations of the above quotation answer the question. Moreover, the negligence is, after all, the breach of a contract. At the time when the contract of transmission is made, there is present the mental element,

[32] 83 Ala. 542, 4 Sou. 844.

the opportunity for the contemplation of the special circumstances, from which damage may result, which does not, and cannot from the nature of things, ordinarily exist in the commission of a tort.

Another reason for the general doctrine in regard to cipher messages is brought out in the *Primrose Case*. It is that the probability of error is much greater in a cipher dispatch than in an intelligible message, since the operator has not the assistance of the context, and that it would be unreasonable and unjust to hold the company liable for the extended damages that may result from a small error so easy to be made. In that case a difference of one dot changed "bay" to "buy" and caused a considerable pecuniary loss.

The stipulation on the back of the telegraph blanks, that the company shall not be liable "for errors in cipher or obscure messages," is simply an affirmation of the law recognized in most of the States.[33]

In those States which allow more extended damages, it is held void as an attempt to limit liability.[34]

(3). *Mental Anguish.*

In regard to mental anguish as an element of damages, there is in the cases much confusion and conflict. It is to be borne in mind that the question under consideration is whether *compensatory* damages for mental anguish should be allowed. In a proper case, exemplary damages may be recovered, but with such damages we are not now concerned. It is admitted that, if physical suffering is the proximate result of the breach of duty, the consequent mental suffering may be included in the measure of damages.[35] But, from the nature of things, physical suffering can rarely be the natural and proximate result of negligence in the transmission or delivery of a telegram. So, also, if there is a substantial or material injury sufficient to support an action, the mental anguish suffered in connection with the injury may be considered in

[33]Primrose v. Teleg. Co., 154 U. S. 1; Cannon v. Teleg. Co., 100 N. C. 300, 6 Am. St. Rep. 590.

[34]Western U. Teleg. Co. v. Way, 83 Ala. 542, 4 Sou. 844; Western U. Teleg. Co. v. Eubank, 100 Ky. 591, 66 Am. St. Rep. 361; Western U. Teleg. Co. v. Reynolds, 77 Va. 173, 46 Am. Rep. 715; Shaw v. Teleg. Co., 79 Miss. 670, 89 Am. St. Rep. 666.

[35]Young v. Teleg. Co., (S. C.) 43 S. E. 448; Thompson v. Teleg. Co., 106 N. C. 549, 11 S. E. 269. Cf. Kennon v. Gilmer, 131 U. S. 22; Ranson v. New York etc. R. Co., 15 N. Y. 415; Porter v. Hannibal etc. R. Co., 71 Mo. 66, 36 Am. Rep. 454.

making the quantum of the damages.[36] Though there is some conflict here, a few courts holding that mental anguish is never to be considered an element of damages unless inseparably connected with physical pain, the better view, and that supported by the great weight of authority, is that just stated.[37] Lord Wensleydale, in a concurring opinion in *Lynch* v. *Knight*,[38] says:

"Mental pain or anxiety the law cannot value and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible that a jury in estimating it should altogether overlook the feelings of the party interested."[39]

It is enough that the mental suffering is properly and proximately connected with a recognized cause of action. The fact that the cause of action is a breach of contract does not prevent recovery for mental anguish in addition to substantial damages. It is true that, in general, damages for mental anguish are not recoverable in actions for the breach of contracts, but the reason is that such damages are generally too remote—they are not within the contemplation of the parties as the probable consequence of the breach, since most contracts are made with a view to pecuniary benefit. There is no principle of law which prevents recovery for mental anguish when it is, at the time the contract is made, within the contemplation of the parties as the probable result of its breach.[40] The breach of a contract of marriage is an illustration of this principle. It is said that it is an exception to the general rule, that damages for mental suffering are not recoverable, in an action on contract, but it is rather an exception to the rule that most contracts are made for pecuniary profit.

[36]Western U. Teleg. Co. v. Broesche, 72 Tex. 654, 13 Am. St. Rep. 843; Western U. Teleg. Co. v. Proctor, (Tex.) 25 S. W. 11. See Connelley v. Teleg. Co., 100 Va. 51, 93 Am. St. Rep. 919. (It is so provided in Virginia by statute.) Cf. Lynch v. Knight, 9 H. L. Cas. 577, 8 Eng. Rul. Cas. 388.

[37]See: 8 Amer. & Eng. Encyc. of Law, (2d. ed.) p. 658; Head v. Georgia Pac. R. Co., 79 Ga. 358, 11 Am. St. Rep. 434 (personal injury from neg.); Craker v. Chicago etc. R. Co., 36 Wis. 657, 17 Am. Rep. 504 (trespass vi et armis); Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 758 (trespass quare clausum); Magee v. Holland, 3 Dutcher (N. J.) 861, 72 Am. Dec. 341 (seduction of daughter); Lombard v. Lennox, 155 Mass. 70, 28 N. E. 1125, and Terwilliger v. Wands, 17 N. Y. 54 (slander and libel); Catlin v. Pond, 101 N. Y. 649, 5 N. E. 41 (false imprisonment); Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. 864 (mal. pros.); Thorn v. Knapp, 42 N. Y. 474 (breach of promise of marriage).

[38]9 H. L. Cas. 577, 8 Eng. Rul. Cas. 388.

[39]See also Cooley on Torts, p. 271.

[40]See 8 Am. & Eng. Encyc. of Law (2d. ed.), p. 672, and cases there cited; Renihan v. Wright, 125 Ind. 536, 21 Am. St. Rep. 249; Thorn v. Knapp, 42 N. Y. 474; Mentzer v. Teleg. Co., 93 Iowa 792, 57 Am. St. Rep. 294; Wadsworth v. Teleg. Co., 86 Tenn. 695, 6 Am. St. Rep. 864; Hale on Damages, p. 102.

The chief difficulty arises where the plaintiff, having suffered no other substantial or material damage, seeks to recover compensation for the mental anguish he has suffered because of the negligence of the telegraph company in regard to a "social message." For example, a telegram, summoning the plaintiff to the bedside of his dying mother, is not promptly delivered, and he sues the company for damages for his mental suffering from not being able to be with her in her last hours. It is in such cases as this that the question as to the liability of a telegraph company in damages for mental anguish most frequently arises. Recovery in such case was first allowed in eighteen eighty-one, by the Texas court in *So Relle* v. *Teleg. Co.*[41]

The doctrine has been adhered to in that State and adopted, with some diversity of reasoning, in Kentucky, Tennessee, Iowa, North Carolina, Alabama and Louisiana, and in South Carolina by statute.[42] It was adopted also in Indiana, but has recently been repudiated there.[43]

The federal courts and the courts of the majority of the states in which the question has been raised have repudiated the "Texas doctrine," holding that recovery cannot be had for mental anguish separate from other injury.[44]

[41]55 Tex. Ct. App. 308, 50 Am. Rep. 805.

[42]Western U. Teleg. Co. v. Cooper, 71 Tex. 507, 10 A. M. St. Rep. 772; Western U. Teleg. Co. v. Cavin, (Tex.) 70 S. W. 229; Western U. Teleg. Co. v. Waller, (Tex.) 74 S. W. 751; Chapman v. Teleg. Co., 90 Ky. 265, 13 S. W. 880; Western U. Teleg. Co. v. Van Cleave, 107 Ky. 464, 92 Am. St. Rep. 366; Davis v. Teleg. Co., 107 Ky. 527, 92 Am. St. Rep. 371; Western U. Teleg. Co. v. Parsons, (Ky.) 72 S. W. 800; Wadsworth v. Teleg. Co., 36 Tenn. 695, 6 Am. St. Rep. 864; Western U. Teleg. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; Western U. Teleg. Co. v. Robinson, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431; Mentzer v. Teleg. Co., 93 Iowa 792, 57 Am. St. Rep. 294; Young v. Teleg. Co., 107 N. C. 307, 22 Am. St. Rep. 883; Cashions v. Teleg. Co., 124 N. C. 123, 45 L. R. A. 163; Efird v. Teleg. Co. (N. C.), 43 S. E. 825; Western U. Teleg. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148; Western U. Teleg. Co. v. Wilson, 93 Ala. 32, 30 Am. St. Rep. 23; Western U. Teleg. Co. v. Crocker, 135 Ala. 492, 33 Sou. 45; Graham v. Teleg. Co., (La.) 34 Sou. 91; Simmons v. Teleg. Co., (S. C.) 41 S. E. 521, 57 L. R. A. 607.

[43]Reese v. Teleg. Co., 123 Ind. 224, 24 N. E. 163, overruled by Western U. Teleg. Co. v. Ferguson. 60 N. E. 74, 54 L. R. A. 846.

[44]Connell v. Teleg. Co., 116 Mo. 34, 38 Am. St. Rep. 575; Francis v. Teleg. Co., 58 Minn. 252, 49 Am. St. Rep. 507; Morton v. Teleg. Co., 53 Ohio St. 431, 53 Am. St. Rep. 648; West v. Teleg. Co., 39 Kans. 93, 7 Am. St. Rep. 530; Western U. Teleg. Co. v. Ferguson, (Ind.) 60 N. E. 674, 54 L. R. A. 846 (overruling Reese v. Teleg. Co., supra); Connelley v. Teleg. Co., 100 Va. 51, 93 Am. St. Rep. 919; Lewis v. Teleg. Co., 57 S. C. 325, 35 S. E. 556 (changed by statute); Davis v. Teleg. Co., 46 W. Va. 48, 32 S. E. 1026; Western U. Teleg. Co. v. Rogers, 68 Miss. 748, 24 Am. St. Rep. 360; International Ocean Teleg. Co. v. Saunders, 32 Fla. 434, 14 Sou. 148, 21 L. R. A. 810; Summerfield v. Teleg. Co., 87 Wis. 1, 59 N. W. 973; Logan v. Teleg. Co., 84 Ill. 468; Chapman v. Teleg. Co., 88 Ga. 763, 15 S. E. 901; Giddens v. Teleg. Co., 111 Ga. 824, 35 S. E. 638; Peay v. Teleg. Co., 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463; Russell v. Teleg. Co., 3 S. Dak. 315, 19 N. W. 408; Butner v. Teleg. Co., 2 Ok. 234, 37 Pac. 1087; Chase v. Teleg. Co., 44 Fed. 554; Crawson v. Teleg. Co., 47 Fed. 544; Western U. Teleg. Co. v. Wood, 57 Fed. 471, 21 L. R. A. 706; Stansell v. Teleg. Co., 107 Fed. 668. But see Beasley v. Teleg. Co., (Tex.) 39 Fed. 181.

Before considering the reasoning of the decisions in the two classes, it will be appropriate to note the limitations and restrictions placed upon the doctrine allowing recovery in such cases. In Alabama the right to recover for mental anguish is confined to one who has a right to sue, and recover at least nominal damages, on the contract.[45]. In the other states, mental anguish is, of itself, held sufficient damage to support a purely tort action brought for the negligent breach of duty.

In the first place, the anguish must have been actually suffered, as the result of the negligence of the telegraph company,[46] and it must be real, not fanciful or imaginary.[47] In general, the right of recovery is confined to the more grievous forms of mental anguish, such as that suffered from not being able to attend the funeral of a near relative, or to be with him in his last hours. Mere anxiety or discomfort is not sufficient.[48] The right is also limited, it seems, to cases of close relationship,[49] though there seems no reason for the limitation, beyond the difficulty of proving the mental suffering.[50] If the relation is very close, as that between father and son, or husband and wife, mental anguish is presumed, but, if not so close, some peculiar attachment must be proved.[51]

According to the rules for ascertaining the measure of damages, the mental suffering must be the natural and proximate result of the breach,[52] and mental suffering must have been in the contemplation of the parties as the probable result of the breach. This necessary notice the company may acquire, either from the face of the message,[53] or from information from the sender.[54] Since it is

[45]Western U. Teleg. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148; Western U. Teleg. Co. v. Wilson, 93 Ala. 32, 30 Am. St. Rep. 23; Western U. Teleg. Co. v. Crocker, 135 Ala. 492, 33 Sou. 45. But see Western U. Teleg. Co. v. McNair, 120 Ala. 99, 23 Sou. 801.

[46]Western U. Teleg. Co. v. Linn, 87 Tenn. 38, 47 Am. St. Rep. 58; Western U. Teleg. Co. v. Motley, 87 Tex. 38, 27 S. W. 52.

[47]Morrison v. Teleg. Co., (Tex.) 59 S. W. 1127; Western U. Teleg. Co. v. Griffin, 93 Tex. 530, 77 Am. St. Rep. 496.

[48]Western U. Teleg. Co. v. Cooper, 71 Tex. 507, 10 Am. St. Rep. 772; Western U. Teleg. Co. v.Arnold, (Tex.) 73 S. W. 1043; Robinson v. Teleg. Co., (Ky.) 68 S. W. 656, 57 L. R. A. 611.

[49]Western U. Teleg. Co. v. Ayers, 131 Ala. 391, 90 Am. St. Rep. 92; Davidson v. Teleg. Co., (Ky.) 54 S. W. 830; Western U. Teleg. Co. v. Steinberg, (Ky.) 54 S. W. 829.

[50]See Bright v. Teleg. Co., (N. C.) 43 S. E. 843; Western U. Teleg. Co. v. Wilson, (Tex.) 75 S. W. 482.

[51]See Bright v. Teleg. Co. and Western U. Teleg. Co. v. Wilson, supra.

[52]Western U. Teleg. Co., 71 Tex. 507, 10 Am. St. Rep. 772; Western U. Teleg. Co. v. Carter, 85 Tex. 580, 34 Am. St. Rep. 826.

[53]Darlington v. Teleg. Co., (N. C.) 37 S. E. 478.

[54]Western U. Teleg. Co. v. Evans, (Tex.) 23 S. W. 998.

sufficient to put the company on notice of the likelihood of mental suffering, it is necessary only that the message show its nature and the consequent urgency for haste, and not that it show the relation between the parties.[55] Upon this point, the Texas decisions are conflicting.[56]

The position of the courts which follow the Texas doctrine is clearly stated by Sherman and Redfield, in their text-book on Negligence.[57] Indeed, it is upon this quotation that the decision in the *So Relle* case seems to rest:

"In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages."

There is no little reason and justice in the doctrine. The law has always allowed compensation for physical suffering, and mental suffering is just as real, and oftentimes more grievous. Clark, J. in *Young* v. *Teleg. Co.*,[58] quotes from Cicero as follows:

"Nam quo major vis est animi quam corporis, hoc sunt graviora ea quæ concipiuntur animo quam illa quæ corpora."

"For as the power of the mind is greater than that of the body, in the same way the sufferings of the mind are more severe than the pains of the body."

It is undeniable, also, that the mental anguish is the direct result of the negligence of the company in the performance of a public duty. The breach of duty defeats the very object of the contract of transmission, and produces an injury, which, where the company knows the nature of the message, is clearly within the contemplation of both parties to the contract as the natural result of its breach. To quote again from Clark, J., in *Young* v. *Teleg. Co.*:

"If no pecuniary damages can be recovered for a breach of the duty to deliver such messages, beyond the paltry sum charged for transmission, the

[55]Davis v. Teleg. Co., 107 Ky. 527; Lyne v. Teleg. Co., 128 N. C. 129, 31 S. E. 350; Cashion v. Teleg. Co., 124 Ill. 123, 45 L. R. A. 163.

[56]See Western U. Teleg. Co. v. Moore, 76 Tex. 66, 18 Am. St. Rep. 25; Western U. Teleg. Co. v. Carter, 85 Tex. 580, 34 Am. St. Rep. 826; Western U. Teleg Co. v. Luck, 91 Tex. 178, 66 Am. St. Rep. 869.

[57]Sec. 605.

[58]107 N. C. 307, 22 Am. St. Rep. 883.

usefulness and value to the public of such corporations will be materially dimnished."

To allow substantial damages where a small pecuniary loss is the basis of the action, and only small, or no, damages where great mental suffering has been caused,

"would sanction the company in wrongdoing. It would hold it responsible in matters of least importance and suffer it to violate its contracts with impunity as to the greater."[59]

To the contention that the doctrine is an innovation in the law, it is replied that telegraphy is a comparatively new art, and that the law must be adapted to meet the new conditions which arise from its peculiar nature.[60]

The doctrine of the Alabama court has the merit of accord with precedents, as well as of reason. As above noted, recovery for mental anguish is allowed when the plaintiff has already a right of action—that is, when he is suing on the contract. Since the breach of the contract is sufficient to sustain his action and to entitle him to nominal damages, he may recover, in addition thereto, compensation for his mental suffering. The Alabama court has recognized the true principle upon which damages for mental suffering are refused or allowed. It is not the difficulty of measuring the suffering in pecuniary terms that has restricted the recovery. That difficulty exists, as well where such damages are allowed in addition to other damages, as where the mental suffering is the sole basis of the action. The reason lies in the fact that mental tranquility is not a right recognized and protected in law. Every one is protected in his person, his property and his reputation; but, as there does not yet exist a right to privacy, so there is no right to peace of mind. In other words, mental suffering alone is not sufficient to support an action; but, given the right to maintain an action, compensation may be obtained for the mental suffering which directly results from the wrongful act for which the action is brought. This principle is illustrated by actions for assault, where the shame and disgrace constitute the substantial part of the recovery, by actions by a father for the seduction of his daughter, founded on the fiction of the loss of services, by action for slander and libel actionable *per se,* by actions for false impris-

[59]Holt, J., in Chapman v. Teleg. Co., 90 Ky. 265, 13 S. W. 880.
[60]See Mentzer v. Teleg. Co., 93 Iowa 752, 37 Am. St. Rep. 294.

onment, etc.[61] In all these cases the mental suffering may have been the only real injury done, but the existence of the right to bring the action allows recovery for such injury.

The courts of the majority of the states believe it safer to abide by the established law, that mental suffering alone is not sufficient to support an action.[62] They recognize in the new doctrine a dangerous departure from precedents. Says Canty, J., in a concurring opinion in *Francis* v. *Teleg. Co.*:[63]

"If everyone were allowed damages for injuries to feelings caused by someone else, the chief business of mankind might be fighting each other in the courts. Damages for mental suffering open into a field without boundaries, and there is no principle by which the courts can limit the amount of the damages."

There are many instances in which mental anguish fully as acute as that suffered from the delay of a social message may result from a wrongful act, and yet no recovery is allowed. For example, a brother, however great his anguish, cannot recover for the seduction of his sister. A passenger cannot recover for his mental suffering, though severe, caused by the delay of a railway train.[64] Because of the fact that any other rule would result in an intolerable amount of litigation, and of the additional fact that mental suffering is a quantity too uncertain and variable to be proved or measured, the law has refused to recognize mental tranquillity as a right to be protected.

Even as an element of damages in addition to other substantial injury, mental anguish has been admitted in but two limited classes of cases: *First,* where the anguish is inseparably connected with physical pain; *secondly,* where it results from wilful wrongs, "affecting the liberty, character, reputation, personal security, or domestic relations of the injured party."[65]

And in the second class of cases, it seems that the damages are, at least, very closely related to punitive damages. There are no cases, outside of the telegraph cases, in which recovery has been allowed for mental anguish, apart from physical suffering, caused by negligence.

[61]See citations in foot-note (37) supra.

[62]See Lynch v. Knight, 9 H. L. Cas. 577, 8 Eng. Rul. Cas. 382; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; Terwilliger v. Wands, 17 N. Y. 54.

[63]58 Minn. 252, 49 Am. St. Rep. 507.

[64]Wilcox v. Richmond etc. R Co. 52 Fed. 264.

[65]Cooper, J., in Western U. Teleg. Co. v. Rogers, 68 Miss. 748, 24 Am. St. Rep. 300.

On the ground of expediency, the minority view merits disfavor. The prophecy of the Minnesota court,[66] that the Texas doctrine had opened a probable Pandora box, has been fulfilled in the ceaseless litigation which it has produced, and the numerous and often conflicting restrictions that the courts have been obliged to place upon the doctrine.

An answer to the argument that to allow the plaintiff only nominal damages would permit the telegraph companies to escape liability for the non-performance of an important public duty, is found in the pertinent suggestion that the remedy rests, not in a departure from the settled principles of the law, but in the enactment of statutory penalties high enough to compel the performance of the duty.[67]

This is the true solution of the problem.

The position taken by the Alabama court has not been strongly attacked. As above pointed out, it is sound on principle. Probably the reason for the failure of the courts of the other states to adopt it is a desire to avoid the extensive litigation that would follow and a tendency to confine the recovery of damages for mental anguish to the two classes of cases already noted.

On the same principles as those of the Alabama doctrine, it would seem that where a statute gives the addressee the right to maintain an action for a statutory penalty, having the right of action, he should be allowed to add to the penalty damages for his mental suffering.[68] But the idea is not suggested in any of the cases.[69]

The decisions of the Tennessee courts are based, to a great extent, upon a statute, which provides that telegraph companies shall be liable in damages to the party aggrieved by their negligence. It is held that this statute gives the addressee a right of action and that, since he has the right to maintain the action, he may recover damages for mental anguish.[70] Such statutes have generally, and with better reason, been construed as giving the addressee a right

[66]See Francis v. Teleg. Co., supra.

[67]See Francis v. Teleg. Co., supra.

[68]See this view suggested by Prof. Burks in note to Western U. Teleg. Co. v. Goddin, 3 Va. Law. Reg. 220.

[69]This view ignored in Connelley v. Teleg. Co., 100 Va. 51, 93 Am. St. Rep. 919.

[70]Wadsworth v. Teleg. Co., 86 Tenn. 695, 6 Am. St. Rep. 864; Western U. Teleg. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; Gray v. Teleg. Co., 108 Tenn. 39, 91 Am. St. Rep. 706.

to recover damages that are recognized as sufficient to support an action, and not as creating new elements of damage.[71]

The whole subject is a difficult one, involving conflicting principles, and calls for explicit legislative regulation.

(4). *Exemplary Damages.*

It has been a mooted question whether exemplary or punitive damages can be recovered from a corporation for the act of its agent, unless the act is previously authorized or subsequently ratified, but the prevailing rule in the States is that such damages may be recovered, even in the absence of authorization or ratification.[72] The better view seems to be that exemplary damages cannot be recovered for mere negligence.[73] Some of the cases seem to lay down the contrary doctrine, but they qualify their statements by the use of the confusing term, "gross negligence," and further add that the negligence must be so gross as to be wilful.[74] This amounts to nothing more than affirming, what is the true doctrine, that exemplary damages are recoverable only for wilful misconduct. It may be added that the fact that the tort is also the breach of the contract of transmission, or that in form the action is *ex contractu,* should not prevent the recovery of exemplary damages from a telegraph company in proper case.[75]

(5). *The Duty of Injured Party to Reduce Damages.*

As elsewhere, it is the duty of the party injured by the negligence of a telegraph company to use a reasonable degree of diligence to keep down the damages. For example, the plaintiff's telegram to a broker to buy one thousand shares of certain stock for him is changed to read one hundred shares. The plaintiff discovers the mistake in time to buy more before the advance of the

[71]Summerfield v. Teleg. Co., 87 Wis. 1, 57 N. W. 973; Francis v. Teleg. Co., 58 Minn. 252, 49 Am. St. Rep. 507; Western U. Teleg. Co. v. Ferguson, (Ind.) 60 N. E. 674, 54 L. R. A. 846; Connelley v. Teleg. Co., 100 Va. 51, 93 Am. St. Rep. 919.

[72]See extended note 59 Am. St. Rep. 589 et seq.; Lile's Notes on Private Corporations, p. 116 et seq.

[73]Peterson v. Teleg. Co., 72 Minn. 41, 59 Am. St. Rep. 461; West v. Teleg. Co., 39 Kans. 93, 7 Am. St. Rep. 530; Marsh v. Teleg. Co., (S. C.) 43 S. E. 953; Butler v. Teleg. Co., 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893; Western U. Teleg. Co. v. Way, 83 Ala. 542, 4 Sou. 844; Western U. Teleg. Co. v. Brown, 58 Tex. 170. 44 Am. Rep. 610; Stuart v. Teleg. Co., 66 Tex. 580, 59 Am. Rep. 623.

[74]Chase v. Teleg. Co., 44 Fed. 554; Marsh v. Teleg. Co., (S. C.) 43 S. E. 953; Butler v. Teleg. Co., (S. C.) 44 S. E. 953; West v. Teleg. Co., 39 Kans. 93, 7 Am. St. Rep. 530. And see 12 Am. & Eng. Encyc. of Law (2d. ed.), p. 28.

[75]G. C. and Santa Fe R. Co. v. Levy, 59 Tex. 542, 46 Am. Rep. 269. See also Head v. Georgia etc. R. Co., 79 Ga. 358, 11 Am. St. Rep. 434, 12 Am. & Eng. Encyc. of Law (2d. ed.), p. 20; 1 Sedgw. Dam., Sec. 208, note 1.

price. Held, his failure to make the purchase will reduce his recovery to nominal damages.[76]

This rule is very similar to the doctrine of contributory negligence, the difference being that contributory negligence is a bar to the right of action, while failure to reduce, or keep down, damages merely cuts down, *pro tanto,* the amount of the recovery.

VI. Statutory Penalties and Conflict of Laws.

(1). *Statutory Penalties.*

The effect of the various statutes has been considered incidentally in connection with the principles above discussed. A review of the statutes regulating telegraph companies in regard to messages would be impracticable. It is sufficient to note that the subjects which we have considered, on account of their importance and the conflicting opinions in regard to them, have in most of the states been regulated, in some measure, by statutes.[1]

In many of the states penalties, to be recovered by the party injured by the breach of duty on the part of the telegraph company, have been imposed. These penalties are recoverable, in general, for partiality in transmitting, or for negligence or wilful misconduct in transmission or delivery.[2] They may be recovered by the party injured, either separate from, or in addition to, substantial damages,[3] and even where no substantial damage is alleged or proved.[4] So also the penalty may be recovered, even though the company has already satisfied the plaintiff's claim.[5] It is enough that the breach of duty is proved. In Indiana the right to the penalty is confined to the sender,[6] but in most of the other states it is given to the addressee as well.

[76]Western U. Teleg. Co. v. Marr, 85 Tenn. 529, 3 S. W. 496. See also Western U. Teleg. Co. v. Crawford, 110 Ala. 460, 20 Sou. 111, Western U. Teleg. Co. v. Way, 83 Ala. 542, 4 Sou. 844; Western U. Teleg. Co. v. Woods, 56 Kans. 737, 44 Pac. 989; Fererro v. Teleg. Co., 9 App. D. C. 455, 35 L. R. A. 548; Postal Cable Co. v. Shaefer (Ky.), 62 S. W. 1119; Gulf C. & S. F. R. Co. v. Loomis, 82 Tex. 323, 27 Am. St. Rep. 891; Western U. Teleg. Co. v. Jeanes, 88 Tex. 230, 31 S. W. 186.

[1]See 2 Stimson's Am. St. Law, Sec. 8950-8952.

[2]2 Stimson's Am. St. Law, Sec. 8950-8952; Mathis v. Teleg. Co., 94 Ga. 338, 47 Am. St. Rep. 167; Connelley v. Teleg. Co., 100 Va. 51, 93 Am. St. Rep. 919; Western U. Teleg. Co. v. Ferguson (Ind.), 60 N. E. 679; Marshall v. Teleg. Co., 79 Miss. 154, 89 Am. St. Rep. 585; Stafford v. Teleg. Co., (Cal.) 73 Fed. 273.

[3]Mathis v. Teleg. Co., 94 Ga. 338, 47 Am. St. Rep. 167; Baldwin v. Teleg. Co., 93 Ga. 692, 44 Am. St. Rep. 194; Connelley v. Teleg. Co., 100 Va. 51, 93 Am. St. Rep. 919.

[4]Stafford v. Teleg. Co., (Cal.) 73 Fed. 273; Western U. Teleg. Co. v. Ferguson, (Ind.) 60 N. E. 679; Western U. Teleg. Co. v. Goddin, 94 Va. 513.

[5]Western U. Teleg. Co. v. Taylor, 84 Ga. 408, 8 L. R. A. 189.

[6]Western U. Teleg. Co. v. Ferguson, (Ind.) 60 N. E. 679.

The statutes imposing these penalties, like other penal statutes, are to be construed strictly, in favor of the telegraph companies, and they must be interpreted to accord, as far as possible, with the rights of the companies. For example, where a statute imposes a penalty for non-delivery, it means non-delivery within reasonable office hours.[7]

Since telegraph companies are engaged in interstate commerce,[8] a question arises as to the constitutionality of these penalties, as applied to messages transmitted from one state into another, whether they are an interference with interstate commerce. In *Western U. Teleg. Co.* v. *Pendleton*,[9] it was held by the Federal Supreme Court that where a message was sent from Indiana into Iowa and not promptly delivered, the plaintiff could not recover, even in an Indiana court, the penalty imposed by the Indiana statute, for the delay in delivery in Iowa. The Indiana statute was held unconstitutional, as regards non-delivery in Iowa, as being a regulation of, and an interference with interstate commerce, and an extension of the penal law of one state into another such as, if held valid, would result in confusion and conflict. On the other hand, the same court, in *Western U. Teleg. Co.* v. *James*,[10] where a message sent from Alabama into Georgia was delayed in delivery, held that the penalty imposed by the Georgia statute could be recovered in a Georgia court for the delay in delivery in Georgia. The case was distinguished from the *Pendleton Case*, and it was held that the penal statute here was not an interference with interstate commerce, but that it rather tended to expedite it by compelling the telegraph companies to perform their duty, and that it was not an extension of a penal law of Georgia into Alabama, because it merely provided a penalty for the non-performance of a public duty in Georgia. It seems that where the penalty is for error or delay in transmission it would, in such cases, be held unconstitutional as an interference with interstate commerce. This is intimated in the *James Case* and held in *Marshall* v. *Teleg. Co.*[11]. In a Virginia case, it is held that a message from a point in Virginia to another in the same state, though it passes

[7]Western U. Teleg. Co. v. Hardin, 103 Ind. 505, 3 N. E. 172. See also: Western U. Teleg. Co. v. Ward, 23 Ind. 377, 85 Am. Dec. 462; Western U. Teleg. Co. v. Buskirk. 107 Ind. 549, 8 N. E. 557; and extended note 53 L. R. A. 738 et seq.

[8]Teleg. Co. v. Texas, 105 U. S. 460; State of N. C. ex. rel. Railroad Com. v. Teleg. Co., 113 N. C. 213, 22 L. R. A. 570.

[9]122 U. S. 374. [10]162 U. S. 650. [11]79 Miss. 154, 89 Am. St. Rep. 585.

through a portion of West Virginia, is a domestic message, and that, as to such messages, the constitutionality of the statutory penalties cannot be questioned.[12]

(2.) *Conflict of Laws.*

Closely akin to these constitutional questions are those arising out of conflict of laws. When a contract is made for the transmission of a message from one state into another, questions arise as to what is the proper law to govern the validity, performance, etc., of the contract.

As to the validity of the contract, questions of conflict of laws will generally arise in regard to the exemptions in the contract, as the repetition clause, the cipher clause, the claim clause, etc. Since these clauses are either void or valid in the very making of the contract, the *lex loci celebrationis,* the law of the place from which the message is sent, will govern.[13]

Whether the company has properly performed its duty, and consequently its liability for non-performance, will be determined by the law of the place of performance, the *lex loci solutionis.*[14] The question arises, what is the place of performance when a message is to be transmitted from one state into another? For delay in delivery, it seems that the law of the place of delivery, the destination of the message always determines the liability.[15] It is at the same time the place of the final performance of the contract and the place of the occurrence of the negligence. When the negligence occurs in a state other than that of the destination of the message, there is a difference of opinion as to which law should govern the liability. If the performance of the contract is regarded as an entirety, then the destination of the message is the place of performance, and the law of that place governs in all mat-

[12]Western U. Teleg. Co. v. Reynolds, 100 Va. 459, 93 Am. St. Rep. 971, citing Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192. But see the late case, Hanley v. Kansas City etc. R. Co., 187 U. S. 617, distinguished from the Lehigh case, and more nearly parallel to the Reynolds case, holding that regulation of prices for transportation of goods, from one point in a state through a part of another state to a second point in the same state, is an interference with interstate commerce.

[13]Reed v. Teleg. Co., 135 Mo. 661, 58 Am. St. Rep. 609 (repetition clause); Shaw v. Teleg. Co., 79 Miss. 670, 89 Am. St. Rep. 666 (cipher clause); Burgess v. Teleg. Co., 92 Tex. 831, 71 Am. St. Rep. (claim clause); Minor's Conflict of Laws, Sec. 169. But see Western U. Teleg. Co. v. Eubank, 100 Ky. 591, 66 Am. St. Rep. 361.

[14]Gray v. Teleg. Co., 108 Tenn. 39, 91 Am. St. Rep. 706, and note; Western U. Teleg. Co. v. Preston, (Tex.) 54 S. W. 650; Thompson v. Teleg. Co., (Tex.) 61 S. W. 501. And see Western U. Teleg. Co. v. James, 162 U. S. 651.

[15]Gray v. Teleg. Co., 108 Tenn. 39, 91 Am. St. Rep. 706; Thompson v. Teleg. Co., (Tex.) 61 S. W. 501; Western U. Teleg. Co. v. James, 162 U. S. 651.

ters relating to the performance of the contract.[16] But since the breach of contract is also a tort, the more practicable rule seems to be to consider the undertaking as being performed by stages over the whole course of transmission. In other words, the place of performance is partly in one state and partly in the other, so that the law of the place where the negligence occurs, which is both the *locus solutionis* and the *locus delicti,* should govern.[17]

Whether the addressee has a right to maintain an action, whether mental anguish is sufficient injury to sustain an action, whether the plaintiff is entitled to substantial or only nominal damages—these matters, being a part of the very right growing out of the breach, are governed by the law of the place of performance.[18] The burden of proof of negligence, as well as all other matters relating merely to the remedy, the law of the forum governs.[19]

Finally, it is to be noted that a penalty provided by the *lex loci solutionis* or *lex loci delicti* is not recoverable in the court of another state.[20]

[*Concluded.*]

[16]Cf. Dike v. Erie R. Co., 45 N. Y. 113, 6 Am. Rep. 43.

[17]See Minor's Conflict of Laws, Sec. 160.

[18]Gray v. Teleg. Co., 108 Tenn. 39, 91 Am. St. Rep. 706, and note; Western U. Teleg. Co. v. Preston, (Tex.) 54 S. W. 650; Thompson v. Teleg. Co., (Tex.) 61 S. W. 501; Minor's Conflict of Laws, Sec. 198, Sec. 188.

[19]Minor's Conflict of Laws, Sec. 197.

[20]Rogers v. Teleg. Co., 122 Ind. 395, 17 Am. St. Rep. 373; Minor's Conflict of Laws, Sec. 10.